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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929

No. ~~520~~ 21

UNITED STATES OF AMERICA,

Petitioner,

against

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON, J. FREDERICK EAGLE, WILLIAM GREENOUGH, SHERMAN DAY, CARROLL G. WALTER and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. McCRORY and DUDLEY C. MONK, composing the firm of McCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of Jackson Barnett,

Respondents.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS TO WHOM ALLOWANCES WERE MADE

JOHN W. DAVIS,
Counsel for said Respondents,
15 Broad St.,
New York, N. Y.

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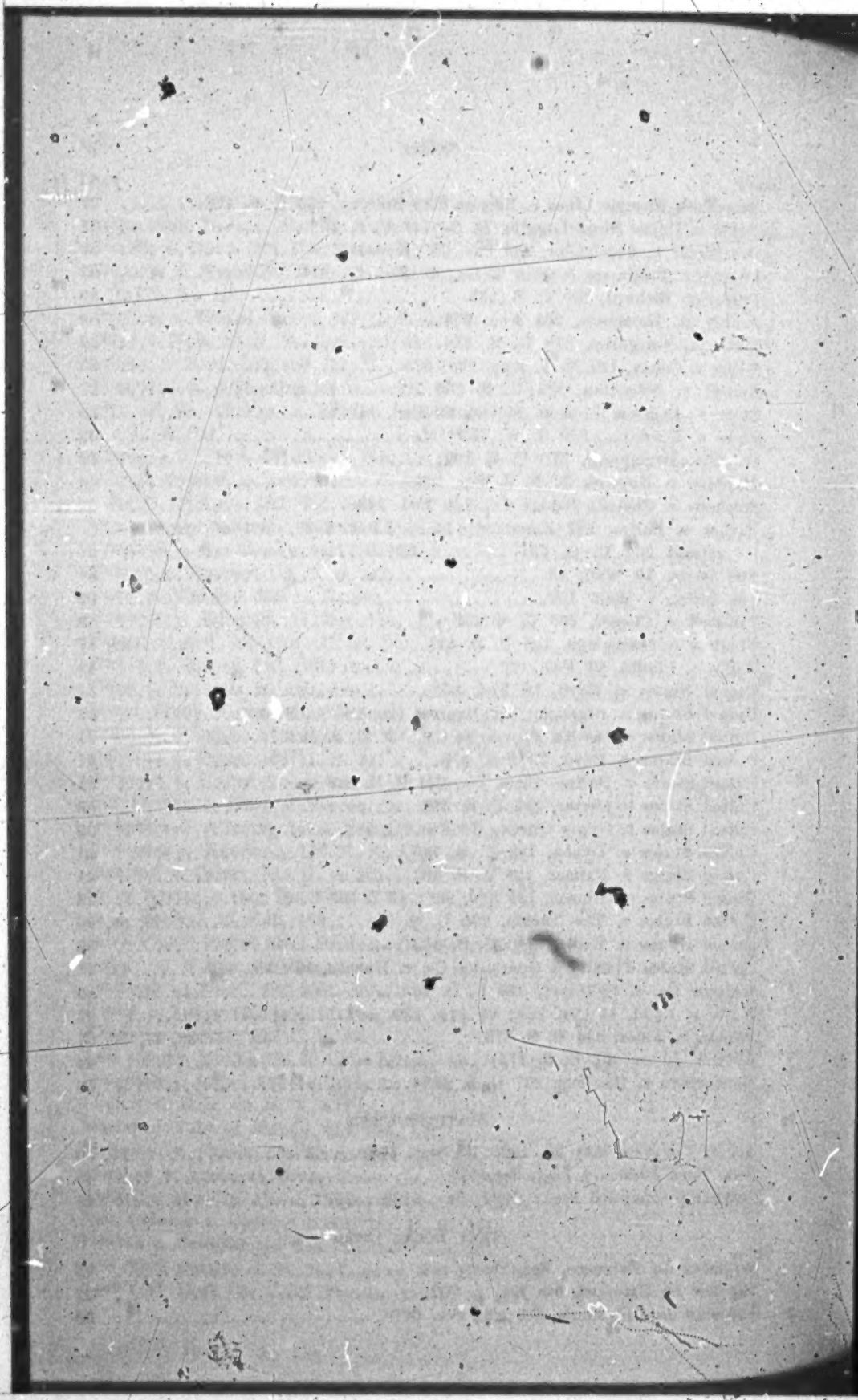

Supreme Court of the United States

OCTOBER TERM, 1929.

UNITED STATES OF AMERICA,
Petitioner,
against
THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, ALDRICH & ROBERTS; EDWARD J. PATTERSON, J. FREDERICK EAGLE, WILLIAM GREENOUGH, SHERMAN DAY, CARROLL G. WALTER and DODGE L. MARKS, composing the firm of PATTERSON, EAGLE, GREENOUGH & DAY; RAYBURN L. FOSTER and R. B. F. HUMMER, composing the firm of HUMMER & FOSTER; ALMOND D. COCHRAN, surviving partner of the firm of COCHRAN & ELLISON; C. B. MCCRORY and DUDLEY C. MONK, composing the firm of MCCRORY & MONK; and ELMER S. BAILEY, individually and as *prochein ami* of Jackson Barnett,
Respondents.
No. 530.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS TO WHOM ALLOWANCES WERE MADE.

(Being all respondents except Equitable Trust Co., and Murray, Aldrich & Roberts)

State of the Record.

The printed transcript does not contain the entire record. Besides the matter there contained, several vol-

umes of "depositions, testimony, exhibits and briefs", pertinent as showing some of the facts here relied upon as well as the extent and nature of the services rendered, were before the courts below as part of the record although not actually printed. The parties so stipulated and the court so ordered. (See R. 172-174.) A suggestion of diminution was submitted by us January 13, 1930, but has not been passed upon. If the court decide that petitioner may proceed without printing the entire record, we ask the privilege of submitting one copy of the additional matter unprinted, as was done in the Circuit Court of Appeals.

Opinions Below.

The opinion of the District Court reported in 21 Fed. 2nd 325, is its opinion upon the merits of the case, and not the opinion it delivered in making the decree now under review. That opinion is not reported, but is printed at R. 160-163.

Jurisdiction.

In opposing the granting of this certiorari we urged that, as our petition for rehearing in the court below was actually denied September 7, 1929, and the denial entered of record September 11, 1929 (followed by issuance of mandate to District Court September 11, 1929), the petition for this writ was out of time when filed December 13, 1929. That point, also, is involved in our suggestion of diminution of record submitted January 13, 1930, and not yet formally acted upon by the court. A certified transcript of the proceedings in the court below, showing that it in

fact denied the rehearing more than three months before this certiorari was applied for, is, however, presented with our suggestion of diminution; and unless the point is regarded by the court as having been foreclosed by its action in granting the certiorari, we respectfully again urge that the application was made too late and the certiorari should be dismissed for want of jurisdiction. (See pp. 2-5 of Brief for Respondents in Opposition to Petition for Writ of Certiorari.)

Outline of the Facts.

Petitioner's statement, we feel, does not adequately present the case. There are additional facts which are most material.

Jackson Barnett, in addition to being a full-blood Indian, is *mentally incompetent*, and was so adjudged in 1912, when the proper Oklahoma court appointed a guardian for him (R. 64-66).* In 1920 a white woman kidnapped him, carried him off to Kansas, and married him (R. 68, 69, 84). The marriage was part of a conspiracy to obtain his wealth (R. 68, 69, 84). The woman engaged a Kansas lawyer named McGugin, who negotiated with the then Commissioner of Indian Affairs and other officials for a "distribution" of Barnett's estate then held by the Secretary of the Interior (R. 73-75; 87-91). After McGugin and the Commissioner had agreed upon a fifty-fifty distribution to the wife and to a charity selected by them, Barnett was brought

*Petitioner's failure to present the entire record to this Court makes it impossible for us, in all instances, to give references to the evidence directly establishing some of the facts but for present purposes references to allegations made by petitioner itself and to findings of the courts below are deemed sufficient.

to Washington and made to put his thumb-mark upon an elaborate letter to the Secretary of the Interior in which he stated his desire to make such a gift—$550,000 to the wife and $550,000 to American Baptist Home Mission Society, which had been selected as a "suitable" charity (R. 75, 89-91; 20-23). Secretary Fall "approved" the gift, and thereby removed the restriction on alienation, February 1, 1923 (R. 75, 76) and Barnett's bonds to the extent of $1,100,000 were distributed accordingly.

The Oklahoma court which had appointed the guardian directed him to take steps to recover the gift (R. 114). The guardian did not rush in with a lawsuit. He petitioned Secretary Work, who had succeeded Secretary Fall, to vacate the approval and give his assistance in getting the bonds back, but Secretary Work refused, or at least did nothing (R. 114). The then guardian thereafter resigned and Bailey was appointed as his successor in June, 1924 (R. 113, 114). Bailey, through some of the respondents, again laid the matter before the Secretary of the Interior and also before the Department of Justice (R. 115, 116; 137-139). Their repeated requests that something be done to recover the bonds, or that they be supplied with the funds necessary to accomplish that purpose, were pointedly and definitely rejected by the Secretary of the Interior (R. 116, 117, 138, 139), and the Department of Justice did nothing (R. 117, 118, 160, 161).

Almost two years elapsed after the consummation of the gifts, with still nothing done; and in January, 1925, Bailey, through these respondents as counsel, caused to be instituted in the District Court for Southern New York a suit by Barnett to recover the $550,000 of bonds which had

been given to the American Baptist Home Mission Society. The bill prayed that the bonds be returned to *the plaintiff* (R. 13), and as petitioner here repeatedly treats that prayer as a demand that the bonds be returned to Bailey we here emphasize the fact that the plaintiff was Barnett, not Bailey, and that Bailey did not cause the suit to be instituted in his capacity as guardian but merely as a *prochein ami* (R. 2). Bailey was not a party to the suit, either individually or as guardian, and hence the prayer of the bill cannot be construed as a demand that the bonds be turned over to him. It was, of course, assumed that if the bonds were gotten back from the defendants the court would not direct that they be placed in the actual physical custody of a mental incompetent. Some custodian there would have to be, but the determination of who the custodian should be was expressly left open. As Barnett owned the bonds, and as Barnett was the plaintiff, the prayer had to be that the bonds be returned to him; and they will be returned to him, within the meaning of the prayer of the bill, when they are returned to the Secretary "to be held by him as property of said Jackson Barnett" (R. 97).

Other suits in other jurisdictions were also brought to recover the other $550,000 (R. 117, 118, 137, 138).

About the time respondents brought these suits, a Committee of Congress made some investigation of the part taken by the Commissioner of Indian Affairs in the making of the gifts (R. 115, 138), and in its report to Congress it mentioned this suit and the others and stated that it would be futile for it to express an opinion upon the gifts as that was a matter to be determined by the courts, but that the

question was "of such fundamental importance that it should be determined by the courts as soon as possible" and

> "We therefore are of the opinion that the Secretary of the Interior would be justified in expending a reasonable sum out of the funds of Jackson Barnett in securing an early determination by the Supreme Court of the United States of the issues which have been raised." (R. 117.)

Despite that recommendation of the Congressional Committee, the Secretary of the Interior persisted in his refusal to allow any part of the funds of Barnett to be used in defraying the expenses of the suits brought for the recovery of the gifts (R. 117).

Meanwhile, respondents were still endeavoring to enlist the aid and assistance of the Department of Justice (R. 115-118; 138-139). It later was shown, upon the taking of testimony in this case in June, 1926, that Attorney-General Stone had advised Secretary Work, in February, 1925, that he thought the gifts were unauthorized and that it was the duty of the Government to aid in recovering them (R. 118), but Attorney-General Stone ceased to be Attorney-General immediately thereafter and neither the Secretary of the Interior nor the Department of Justice took any action in that direction. On the contrary, in April, 1925, the Department of Justice filed, in another suit, an answer on behalf of the Secretary of the Interior and the Commissioner of Indian Affairs which indicated that it intended to aid in *upholding* the gifts (R. 118, 119).

Respondents nevertheless continued to urge upon the

Department of Justice that it was the duty of the Government to aid and assist them in their efforts to set aside the gifts, and submitted to that Department memoranda of the facts and the law (R. 115, 116, 118, 124, 139, 140).

The defendant Mission Society and Mrs. Barnett, to whom the other $550,000 had been given, instituted litigation in Oklahoma attacking the validity of the appointment of the guardian—which, of course, involved the validity of the adjudication of Barnett as mentally incompetent—and also attempted, by means of a writ of prohibition from the Supreme Court of Oklahoma, to stop the prosecution of this and other suits for the recovery of the gifts (R. 120-124); and respondents rendered very extensive services in that litigation (R. 120-124; 131-136).

In November, 1925, the United States finally concluded to ask leave to intervene in the suit which respondents had brought in January, 1925, for the recovery of the $550,000 given to the Mission Society (R. 104, 125, 139, 140, 154), after some of the respondents had spent another two weeks in Washington urging that course (R. 139, 140). The United States also intervened in the litigation in Oklahoma in an effort to uphold the guardianship and resist the requested writ of prohibition (R. 125).

The application of the United States for leave to intervene in this case was strenuously resisted by the Mission Society upon the ground, in substance, that the Secretary of the Interior and not the Department of Justice was the proper representative of the United States in such a matter and entitled to determine its policy with respect thereto (R. 53). Respondents actively aided the United States in having its motion granted by, among other things, actually

furnishing to it, at its request, the authorities which the court afterwards cited as sustaining the right to intervene (R. 104, 155; and see opinion of THACHER, *J.*, granting the intervention at R. 51-54).

In its intervening petition the United States prayed that the bonds be declared to be the property of Jackson Barnett and returned to the Secretary of the Interior *"after deducting the reasonable expenses incident to this litigation"* (R. 50, 51; 104; 155).

At the time the United States asked leave to intervene there was pending before the court a motion by respondents for an allowance out of the fund for the purpose of obtaining the money immediately necessary to enable the suit to be prosecuted (R. 154, 103, 104). Decision upon that motion was withheld for a time at the request of the United States (R. 154), but the United States did not oppose the granting of the motion (R. 154, 62). The motion *was* opposed, however, by the defendant Mission Society *upon the precise ground which the United States now urges upon this certiorari*, viz., that the court was without power to grant it because the fund is restricted against alienation except with the approval of the Secretary of the Interior (R. 103, and footnote at p. 24 *infra*).

Despite that opposition, the motion was granted by Judge THACHER by order dated March 2, 1926 (R. 62), and no appeal was taken.

From March, 1926, until January, 1927, respondents were working upon this case *practically continuously* (R. 105), examining documentary evidence, locating and interviewing witnesses, taking depositions in various cities, preparing for trial, trying the case, preparing briefs upon the

merits, &c. (R. 105-109; 111). The trial itself occupied six days (R. 108). The record is over 3,500 pages, and the briefs submitted by respondents on behalf of the plaintiff were 473 printed pages (R. 111). The District Court held the case under advisement for over seven months (R. 109). Subsequent services included the appeal of the Mission Society to the Circuit Court of Appeals and the application to this court for certiorari, and continued to October, 1928 (R. 109-111).

The Interior Department actively opposed the suit from beginning to end. Secretary Work formally and expressly requested the Attorney-General to decline to assist respondents (R. 112, 118; and see finding of District Court at R. 161), and Commissioner Burke actively aided the defendants, not Barnett, upon the trial (R. 112).

The Department of Justice did not yield to the Interior Department's request that its assistance be withheld from respondents, but it consciously, deliberately, and persistently left the burden and heat of the contest upon respondents (R. 125; 155-158; 159). Both courts below have expressly so found (R. 160, 161; 178), the Circuit Court of Appeals saying that respondents "did substantially all that was done" (R. 178).

Moreover, respondents were assured by officials in the Department of Justice that in the event of success they would experience no difficulty in obtaining liberal compensation (R. 159), and it was not until after the Mission Society's appeal had been dismissed and this court had denied a certiorari—in other words, after the suit was won and after the application for allowances had been submitted—that there was the first intimation that respondents'

right to an allowance would or could be questioned. (See comment of District Court at top of R. 162.)

Statute and Regulations Relied Upon by Petitioner.

It is conceded that Barnett's allotment, and also the bonds representing investments of accumulated royalties from the lease thereof, were restricted against alienation under the Act of May 27, 1908, 35 Stat. 312, quoted at pp. 2, 3, 4 of petitioner's brief.

The validity of the regulations there quoted is, however, *not admitted*. Their validity was one of the issues involved in this case. Petitioner itself asserted, in its intervening petition, that the guardian was validly appointed and recognized as such by the United States (R. 66), that the Secretary had authority to disburse Barnett's funds only to the guardian (R. 72), and that the amendatory regulation of October 7, 1922, quoted at page 5 of petitioner's brief, was adopted in order to permit or justify the making of the gift in question and was *void* (R. 74, 75). Petitioner withdrew that allegation upon the trial (R. 83), but the issue as to its validity remained in the case under the bill filed by respondents (R. 9, 10).

No decision as to its validity appears to us to be necessary now, and hence we do not argue the question; but we do not wish to allow petitioner's quotation of the regulation to pass unnoticed as if its validity were unquestioned.

The Fee-Agreements Referred to by Petitioner.

These are wholly immaterial. Respondents did not act under them in bringing the suit, and they never did and do not now base their right to an allowance upon them.

The contract with Hummer & Foster, referred to at pp. 9, 10 of petitioner's brief, was made in Oklahoma with Bailey *as guardian*, with the approval of the Oklahoma court having jurisdiction of the guardianship (R. 114, 125; 127-130). The suit, however, was not brought by Bailey as guardian, and the services were not rendered to him.

The contract with Cochran & Ellison, referred to at pp. 10, 11 of petitioner's brief, was made with certain next of kin and heirs-apparent of Barnett, and it was made prior to Bailey's appointment as guardian (R. 152, 153). Cochran & Ellison and McCrory & Monk did not act under that contract in rendering services in this case, but, on the contrary, acted at the request of Hummer & Foster (R. 114, 115) before Hummer & Foster's contract with the guardian was made (R. 137).

The other respondents did not even know of either of the contracts when the suit was instituted; and *all* respondents acted throughout upon the assumption that their compensation would have to come in the form of an allowance by the court. The assertion, at p. 30 of petitioner's brief, that respondents "entered into this litigation under contingent-fee contracts, under which they agreed to take care of the expenses of the litigation, and in connection with which they freely testified they understood they were to get nothing until the fund had been recovered by their client, Bailey" is not supported by any reference to the record and is wholly untrue in each and every respect.

The Issues which Were Tried, and Nature of Court's Decision upon the Merits.

Petitioner's main contention is built so emphatically upon the assumption that the Secretary's act in approving the gift has been *adjudged to be void*, that we desire to point out here that that assumption is unfounded.

Petitioner's other assumption that the case was really only a trivially simple affair (Brief, pp. 38, 39) likewise needs correction.

The bill which respondents first filed was based upon "the simple proposition that a mental incompetent had made a gift which was void because of his mental incapacity" (R. 102). The answers which were filed to that bill set up as a defense that the plaintiff was "a restricted Indian" and as such was subject to the jurisdiction of the Secretary of the Interior, who had approved the gift, and that in view of such approval no person had any right to attack the validity thereof (R. 102). In view of such answers, an amended bill was filed (R. 103). That amended bill set out, not only that Barnett was mentally incompetent, but also the facts as to how the gifts and the Secretary's approval were obtained; and it charged a conspiracy to obtain Barnett's property (R. 7, 8), an obtaining of the Secretary's approval by misrepresentation of facts (R. 10), and an abuse of discretion and excess of jurisdiction on the part of the Secretary, and also fraud on his part if he knew the facts (R. 11, 12). It also challenged the Secretary's right to pay out or surrender possession of Barnett's funds to anyone other than to or through a legal guardian upon proper order of the court which had appointed the guardian (R. 9).

Petitioner itself likewise alleged that Barnett was a *mental incompetent* (R. 64) and had been duly so adjudged (R. 66), and also set forth conspiracy, fraud, misrepresentation, abuse of discretion, and excess of jurisdiction, in stronger terms than respondents had used in their amended bill (R. 67-70; 73-81), and it likewise challenged the Secretary's authority to distribute the fund to anyone other than the guardian (R. 72, 74, 75).

The issues of fact raised by the pleadings thus were of the broadest and most comprehensive sort—mental capacity, conspiracy, and fraud—and such issues in any case, and particularly in a case involving Government officials, certainly justified and required the most careful and painstaking efforts on the part of counsel to see that the evidence was fully and carefully and accurately presented. The questions of law raised by the pleadings were likewise varied and important and novel—particularly novel in the jurisdiction in which they were presented; and counsel for petitioner has so admitted (R. 145).

It is true that at the opening of the trial petitioner very nearly emasculated its intervening petition by withdrawing some of its most important allegations (R. 83), but that withdrawal was not made until *after the depositions had been taken and the case otherwise prepared for trial;* and, moreover, respondents did *not* withdraw any of the allegations of their amended bill. Still further, petitioner did not withdraw its allegations of fraud practiced upon the Secretary (R. 83, and see p. 10 of brief filed by petitioner in opposition to Mission Society's application for writ of certiorari, No. 320 of October Term 1928, 278 U. S. 626).

Petitioner's present assertion (pp. 38, 39) that the case involved a single issue of fact, which was determined by the court without the assistance of any one, and a single issue of law, is thus far from accurate, and contrary to the sworn statements of petitioner's own attorneys (R. 142-152). A demonstration of its inaccuracy will also be found in the opinion delivered by the District Court in deciding the case, for the opinion shows that the court regarded the evidence which had been adduced as to the circumstances of the gift as being material (R. 84-91).

As to what the District Court actually decided, it is important to note the opening paragraphs of its opinion, which fully disclose its reasoning (R. 84 and 21 Fed. 2d, 326):

> "For the purposes of this case, it may be assumed that the Secretary of the Interior had power and authority to remove the restrictions which the Congress of the United States has placed upon the property of Jackson Barnett, as a full blood Indian of the Creek tribe, and to approve such gifts and donations of his property as he, in fact, made. But, such approval, however honest and disinterested it may have been, cannot give validity to a gift or donation which the apparent donor did not make, and which, by reason of mental incompetency, he was incapable of making. *Jennings* v. *Wood*, 192 Fed. 507; *Kendall* v. *Ewert*, 259 U. S. 139.
>
> "The record now before the Court is of great volume, and it would be a laborious task to summarize all the details of the amazing set of facts that seem to me to compel a conclusion that the instruments under attack should be set aside. By reason of this, my re-

cital of the matters by which I am convinced of Barnett's mental incompetency will be as brief as they can understandingly be stated."

The court thus assumed that the Secretary's act was *valid* but held it to be nevertheless *ineffectual* because even a *valid approval* does not effectuate a gift which in itself is invalid because of the donor's mental incompetency.

It is true that in a subsequent part of its opinion the court described the Secretary's act as "a nullity" (R. 95), but the context makes it clear that the word *nullity* was there used as indicating ineffectiveness in consummating a gift of Barnett's property, and not as indicating any lack of authority to remove restrictions or any invalidity in the Secretary's own act; for the complete setting of the statement is this (R. 94, 95):

"From all the evidence in the case, I am strongly of the opinion that the gifts which purport to have been made by Barnett *cannot be regarded as his acts and deeds, and must be held to be void, and of no effect.* The alleged donor had no real comprehension and understanding of what he was induced to do, and thus was without that clear and unmistakable intention to part with his property which is, as I understand the law, an essential requisite of a gift *inter vivos.* (*Snavely* v. *Henderson*, 204 Fed. 978, and cases cited in 28 C. J. 627.) It is impossible for me to think that Barnett had any more appreciation or concern for the welfare of Bacone University than was felt by some one of his ancestors who passed to 'the happy hunting grounds' of legend, long before he was born. That he knew the value and extent of his property, or conceived the nature of the provisions for himself in the trusts that

were created, appeals to me as incredible. While he is not insane, and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing. In consequence of this, and as stated at the outset, there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity. *Whatever may have been his authority to release restrictions upon Barnett's property*, and admitting the honesty of his belief and that of his subordinates, that the arrangements made were for the Indian's benefit, he was without authority, as were Burke, McGugin, Ward and Mrs. Barnett *to appropriate and give away* property to which they had neither title nor power of disposition."

The court thus again assumed that the Secretary had "authority to release restrictions upon Barnett's property" but said that he was without authority "to appropriate and give away" property to which he had no title; and what it ruled was that as Barnett was incompetent, the Secretary's approval was ineffectual to make a valid gift. The court then, in its next sentence, declared that "the instrument under which Barnett's funds were removed from the custody of the Secretary"—not the Secretary's approval of that instrument—"was and is invalid" (R. 95).

In the concluding paragraph of its opinion the court mentioned the fact that a guardian had been appointed for Barnett in *California*, and it then said (R. 95, 96):

"In view, however, of the fact that the property of Barnett in the hands of the present defendants should not have been removed from the custody of the Secretary of the Interior, under the circumstances then pre-

sented to him, I think the same should be returned to the custody of that official, and there is *no necessity to deal with the question of the relative rights thereto of the Secretary and the guardian of Barnett*, who may at any time have been appointed by either of the States of Oklahoma and California."

The court thus did not attempt to *adjudicate*, as between the Secretary and any guardian, their relative rights to the fund. Knowing that the fund obviously could not be put into the actual physical custody of Barnett, it merely ruled that it should go back to the custody from which it came—there being no guardian before the court claiming a right to the fund.

That the District Court never intended to hold that the Secretary's approval of the gift *considered as a removal of restrictions* was "a void act" or "void and without authority of law", as now asserted at pp. 20-23 of petitioner's brief, is thus clear, we submit, from the opinion delivered by that court in deciding the merits of the case. But if that opinion be in any way ambiguous upon that point, that ambiguity is removed when we look at the court's *decree*, wherein it expressly reserved jurisdiction to make allowances out of the fund before returning it to the Secretary (R. 97), and when we look at what the same judge said of the matter when the question was specifically brought to his attention (R. 162):

"Furthermore, the order, entered upon my findings and conclusions on the merits of the case, clearly implied that fees and expenses in connection with the suit were expected by counsel, and would be allowed by the court. So far as can be remembered, no objec-

tion to such implication was expressed or taken. And certainly, the Government took no appeal from the order. It would appear, therefore, that the question as to the right of the court to make a reasonable allowance had come close to being decided, if it were not already determined.

"Had the Secretary of the Interior never permitted the fund which forms the subject matter of this suit to get beyond his possession and control, I will agree that the court would be powerless to grant relief to any of the present petitions. *The then Secretary, however, saw fit to release the supervision over the disposition of the fund which had been committed to him by Congress.* He was not incompetent, as was the case with respect to Barnett, and until the fund is restored to the possession of the Department of the Interior, that Department is without license to complain that the reasonable costs and expenses incident to the restoration of the fund to its control, are deducted therefrom. The fund is now a *res* within the control of this court, and justice requires that such *res* should bear the fees and expenses of its preservation. *Kendall v. Ewert*, 259 U. S. 139, 149."

Summary of Argument.

Even if petitioner's premises be correct, the answer to its argument is that the United States did in fact consent that respondents be paid out of the fund, and such consent having been so given, it cannot now be revoked after respondents have acted upon it (*Infra*, pp. 19-28).

The order awarding expense money actually adjudicated the right and power of the court to make allowances

out of the fund, and such adjudication is binding upon petitioner as *res adjudicata* (*Infra*, pp. 29-33).

Respondents further contend that the Secretary removed the restriction on alienation when he approved the gift and surrendered his custody of the bonds, and that such removal of the restriction was not and has not been held to be void (*Infra*, pp. 33-36).

Furthermore, the fund was subject to allowances by the court even though the restriction on alienation had not been removed (*Infra*, pp. 36-47).

Respondents had both an equitable and a statutory lien upon the fund and are entitled to an allowance out of it for that reason. Petitioner's contention that the allowances are erroneous because respondents did not perform certain fee contracts is not open for review here, and, in any event, is untenable (*Infra*, pp. 47-53).

The amount of the allowances should not be disturbed. The court must presume, in view of the absence of the complete record, that the decree below is supported by the evidence, and, moreover, this court will not disturb an allowance which two courts below have agreed is not excessive. Moreover, the allowances are in fact fair and reasonable (*Infra*, pp. 53-61).

POINT I.

The United States has in fact consented that respondents be paid out of the fund.

Petitioner describes the decisions below as "an interference with the exercise of the governmental power of the United States over the property of its Indian wards" (p.

16), and stresses the point that "this possession of the United States of Indian funds" is "more than a mere relation of trustee and beneficiary" and is "an exercise of a sovereign, governmental right and policy on the part of the United States" (p. 18), and that "no authority other than the United States" may to the slightest extent "interfere with the exercise of such governmental powers on the part of the United States, in the control, administration, and protection of such Indian funds" (p. 19).

Accepting those assertions *arguendo*, our answer to petitioner's argument is that the United States itself has in fact consented that respondents be paid out of the fund, and the courts below merely gave effect to that consent. The consent has been manifested in numerous ways.

1. Whether or not the United States would take any step to recover this $550,000 for Barnett was a matter of discretion—the rule being stated in *Heckman* v. *United States*, 224 U. S. 413, at p. 446, as follows:

> "In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or if so brought the United States may aid him in its conduct, as in the *Tiger* case."

The United States here elected not to sue and permitted the allottee to "bring his own action." It of course knew that legal services were necessary and were being rendered, and by permitting respondents to bring and proceed with

the action as counsel for the allottee it impliedly consented and agreed that the allottee's property be applied to the payment of those services.

It is of course elementary and familiar law that a contract or agreement to pay for services rendered will be implied, and that rule is equally applicable to the United States.

United States v. *Palmer*, 128 U. S. 262, 269;
United States v. *Berdan Fire-Arms Co.*, 156 U. S. 552, 569;
United States v. *Lynah*, 188 U. S. 445, 464;
United States v. *Buffalo Pitts Co.*, 234 U. S. 228, 232-235.

2. When the United States finally concluded to aid the allottee, it did so by intervening in the suit which it had permitted him to bring through these respondents. Equity Rule 37 expressly provides that an intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding"; and by its intervention the United States, both expressly and impliedly, conceded the right of Barnett to bring this particular suit and the propriety of these respondents as counsel and next friend therein.

That again carried with it, according to settled and familiar elementary principles of implied contracts, an implied consent that the services of the respondents in the suit be paid for out of the property of the allottee whose cause of action they were prosecuting.

Petitioner asserts that when the United States assumes to act "such action on the part of the United States necessarily precludes the prosecution of suits by any and all

persons, including the ward himself, for any similar purpose relating to the same property" (Brief, pp. 19, 36, 37). But that merely shows that if the United States had brought a separate independent suit it might have stopped respondents' suit. It did not elect to bring a separate suit, and the fact that it elected to intervene in respondents' suit thus emphasizes the fact that the United States thereby consented to respondents going ahead and thereby impliedly consented to their being paid out of Barnett's funds.

It is of course true that the Indian cannot by his own act defeat the restriction against alienation or prevent the United States from enforcing it for his benefit, but the *Heckman* and *Tiger* cases both expressly recognize that the Indian may sue to recover his restricted property and may continue such suit even though the United States come in to aid him. That is what was done in the *Tiger* case and what the court reiterated in the *Heckman* case as something which might be done. (See quotation, p. 20 *supra*.)

It is true that the Secretary of the Interior did not request the intervention of the United States. In fact, he opposed it (R. 112). But he was in that respect overruled by the Department of Justice, and when the United States intervened it was the entire executive department, the complete sovereignty, which intervened—the Interior Department as well as the Department of Justice—and the Secretary of the Interior is thus bound by the intervention with all its implications and consequences.

It should be noted, too, that the ground of the opposition of the Mission Society to the intervention of the United States was that the Attorney-General was not

authorized to act for the United States in that matter "in the absence of request by the Secretary of the Interior or direction from the President of the United States" (R. 53), and the court allowed the intervention upon the ground that in such matter the Attorney-General was the authorized representative of the United States (R. 53, 54). Having asked and obtained such a ruling, the United States certainly cannot now claim that the intervention does *not* bind the United States and that a separate consent by the Secretary of the Interior is necessary.

3. In its petition of intervention, the United States, as previously stated, asked that the bonds be declared to be the property of Barnett and returned to the Secretary of the Interior *"after deducting the reasonable expenses incident to this litigation"* (R. 50, 51; 104, 155).

The United States thus thereby expressly consented that respondents be paid out of the fund. And being contained in a pleading, that consent amounted to a *judicial admission*, which no litigant is afterwards allowed to contradict (*Wigmore on Evidence*, Sec. 2590).

Petitioner now nonchalantly tosses that consent aside with the remark that "an amended petition was filed, *correcting* this matter" (Brief, p. 32). The supposed "correction" would seem to consist of the fact that the prayer of the amended petition does not in terms refer to deduction of expenses (R. 82), but obviously the amended petition was not filed for the purpose of eliminating that reference. A comparison of the allegations of the original petition (R. 47-51) with those of the amended petition (R. 63-82) will show that other purposes were in view; and a consent

once given cannot be withdrawn merely by failing to reiterate it. An amended pleading supersedes an original insofar as it serves the function of a pleading, but admissions contained in the superseded pleading are still admissions against the party making them.

4. When respondents asked the court for an allowance out of the fund for expense money with which to prosecute the suit (R. 103, 104), the United States did not oppose the application (R. 154, 62), although the precise point now urged by petitioner in opposition to the present allowances was then urged by the Mission Society in opposition to that application.* The Mission Society also opposed that application upon the further ground that as the United States had been permitted to intervene the requested allowance was unnecessary (R. 155)—the meaning of that being, of course, that the United States could supply the money necessary to take the depositions, &c. Nevertheless, the United States still did not oppose the motion and did not appeal from the order granting it; and thus the United States again recognized that the suit was to be pros-

*Petitioner's failure to bring the entire record to this court makes it impossible for us to give a supporting reference; but under the circumstances we feel justified in here quoting the following from the brief submitted by the Mission Society in opposition to that application:

"The affidavits upon which this motion is made show that the bonds forming the trust fund here involved were so long as they were in the possession of the Secretary of the Interior, the restricted property of plaintiff who was and is a restricted Indian. If it be assumed (which is, of course, not admitted) that the action of the Secretary of the Interior in turning over plaintiff's bonds to the Equitable Trust Company was illegal, nevertheless the bonds still remained and they, together with the accrued income thereon, are the *restricted property of plaintiff and subject to the sole and exclusive control of the Secretary of the Interior;* and the bonds must be returned and the accrued income thereon must be paid to the Secretary of the Interior; and *this Court has no power to direct any other disposition of the bonds or the accrued income thereon.*"

ecuted by respondents at the expense of the fund, and thereby consented that respondents' services should be compensated out of the fund.

Petitioner now asserts that the order granting the application for expense money was "an invalid order" (Brief, p. 29), but it took no such position at that time. What it means by that assertion obviously is that the court had no power to direct payments out of the fund without the consent of the United States, and its failure to take that position at that time thus emphasizes the point that the United States at that time did in fact consent that the suit be prosecuted at the expense of the fund. If the United States then knew or believed that the court could not direct the payment without its consent, then its failure to object amounted to an express consent.

The argument now made that the consent related only to the particular $3,000 then asked for immediate actual expense of depositions, &c., is, we submit, too narrow and technical for serious consideration. The suit either was to be prosecuted by the United States at its own expense or by the respondents at the expense of the fund, and the United States consented to the latter course. Its consent goes to the *entire* expense—the lawyers and next friend as well as the stenographers, notaries, and printers, &c.

6. The fact that after its intervention the United States allowed and encouraged respondents to continue the prosecution of the suit down to its final conclusion, and accepted their help and co-operation even in the part which the United States nominally took in its prosecution (R. 107, 157, 158, 159), is a further and continuing consent by

it that respondents be paid out of the fund. That, indeed, is what its officers said (R. 159).

6. The District Court's final decree on the merits expressly retained jurisdiction *of the cause and of the property* for the purpose of thereafter determining applications for allowances (R. 97, paragraph 3), and the direction to return the fund to the Secretary was expressly made subject to that reservation (R. 97, paragraph 2). As expressed by the judge who made the decree, it "clearly implied that fees and expenses in connection with the suit were expected by counsel, and would be allowed by the court" and "no objection to such implication was expressed or taken" R. 162).

That failure to object was thus a further implied consent, and respondents acted upon it by continuing their services upon the Mission Society's appeal and application for certiorari.

POINT II.

The consent of the United States having been so given, it cannot be revoked.

Respondents' services having been rendered under circumstances which amounted to a consent on the part of the United States that they be paid for by an allowance by the court out of the fund, that consent cannot be revoked to respondents' prejudice after all the services have been rendered.

The situation has all the elements of an implied contract, which, of course, is just as binding and irrevocable as an express contract.

The situation is likewise analogous to a grant, and of course an executed grant cannot be revoked.

Consents, permits, licenses and offers, when acted upon by investing money or changing position, repeatedly have been held to be binding contracts which cannot be revoked.

New York Electric Lines v. *Empire City Subway*, 235 U, S. 179, 193;
Russell v. *Sebastian*, 233 U. S. 195, 204, 208;
Grand Trunk Western Ry. v. *South Bend*, 227 U. S. 544, 555-557;
Noble v. *Union River Logging Railroad*, 147 U. S. 165, 176.

In the case last cited it was held that a decision by the Secretary of the Interior that a certain railroad company was entitled to a right of way over public land could not be revoked by his successor in office.

Another applicable rule is that a party cannot assume successive positions in the course of a suit, or a series of suits, in reference to the same facts, which are inconsistent with each other. He will be confined to the position he first adopts.

Davis v. *Wakelee*, 156 U. S. 680, 689-691, and cases there cited;
Daniels v. *Tearney*, 102 U. S. 415, 421;
Bigelow on Estoppel, 6 ed. p. 732.

In *Davis* v. *Wakelee*, *supra*, the defendant was held precluded from asserting the invalidity of a concededly void judgment against him because in prior judicial proceedings he had asserted its validity.

That doctrine sometimes, but not always, is called estoppel; but whether called estoppel or by any other name, it clearly is applicable to the United States.

It would be applicable even if the United States were being affected in its capacity as sovereign, for the substantial considerations underlying the doctrine of equitable estoppel apply to sovereigns as well as to individuals, at least with respect to their position in judicial proceedings.

United States v. *Stinson*, 125 Fed. 907, 910 (C. C. A. 7th Circuit); aff'd 197 U. S. 200;

State v. *Jackson L. & S. R. Co.*, 69 Fed. 116, per TAFT, LURTON and SEVERENS, *JJ.*

"When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

United States v. *The Thekla*, 266 U. S. 328, 339, 340.

Furthermore, the United States is not here asserting its sovereign rights. It is here merely asserting the rights of Barnett, a private citizen.

POINT III.

The order awarding expense money constitutes an adjudication of the right and power of the courts below to make allowances out of the fund, and is binding upon petitioner as *res adjudicata*.

The question here urged with respect to the power of the court over the fund having been expressly raised and actually decided upon the application for expense money (*supra*, p. 24), the order upon that application makes the question *res adjudicata*. And as petitioner was then a party to the cause and did not appeal from the order (although it was in its nature appealable, *Trustees* v. *Greenough*, 105 U. S. 527), the order is binding upon it.

The fact that petitioner did not then oppose or contest the order does not detract from the force of the adjudication (*Riehle* v. *Margolies*, 279 U. S. 218, 225; *Nashville &c. Ry. Co.* v. *United States*, 113 U. S. 261; *Masters* v. *City of Rainier*, 238 Fed. 827, 832).

Neither is there any merit in petitioner's argument that the order has no binding effect "save and except with respect to the $3,000 directly involved" (Brief, p. 29). The nature of all the allowances is the same, whether they go for legal services, stenographer's services, printer's bills, or what not, because all are comprehended within the single class of expenses incident to the recovery of the fund for Barnett. The fact that a different sum of money is involved is therefore immaterial.

In *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, the court rejected a contention that a judgment holding that

the bank was exempt from taxes for one year was not *res adjudicata* in a suit for taxes for a different year. The court said (p. 396):

> "The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res adjudicata* cannot apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. *The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.* This is the elemental rule, stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear."

The court then reviewed prior decisions and quoted from *Cromwell* v. *Sac County*, 94 U. S. 351, 353, as follows (p. 397):

> "'But where the second action between the same parties is upon *a different claim or demand*, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually litigated and determined* in the original action, not

what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It then quoted from *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 687, as follows:

> "The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which *might have been decided*, but only as to matters which *were in fact decided*."

It then concluded (p. 398):

> "It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the case at bar, as already noted, the precise question here urged with respect to the power of the court over the fund was expressly raised, actually litigated, and in fact decided. The question is thus *res adjudicata*.

The effect of an adjudication as *res adjudicata* is not confined in its operation to subsequent independent actions or proceedings, but is equally applicable to all ancillary or

collateral proceedings in the same suit or action or general proceeding.

Freeman on Judgments, 5 Ed. § 627-a;
Tatlow v. *Bacon*, 101 Kans. 26; 14 A. L. R. 269; writ of error dismissed, 251 U. S. 537;
Estate of Bell, 153 Cal. 331; 95 Pac. 372;
White v. *Ladd*, 41 Ore. 324; 68 Pac. 739;
Overlander v. *Overlander*, 235 Pac. 93 (Kans.);
State v. *Randazzo*, 300 S. W. 755 (Mo.).

It is to be noted, too, that the final decree on the merits likewise amounts to an adjudication of the power of the court to make allowances, because it expressly made the return of the fund to the Secretary *subject* to such allowances as the court should thereafter make out of the fund (R. 97). If the court were without power to make any allowances, then that part of the decree which made the return of the fund subject to allowances was adverse to petitioner, and petitioner could and should have appealed from that part of the decree within three months after it was rendered. There was no occasion for waiting (unless there is to be attributed to petitioner the unworthy motive of desiring that respondents assume the burden of upholding the decree as against the appeal of the Mission Society before it stunned them into insensibility by a contention that they could not be paid for their services), for if there could be no allowance at all, it was futile to wait and see how much of an allowance the court would make.

Having failed to appeal from that part of the final de-

cree which made the return of the fund subject to allowances, petitioner cannot now attack that provision or be heard in opposition to it.

POINT IV.

The Secretary removed the restriction on alienation, and that act of the Secretary was not and has not been held to be void.

A reading of the Act of May 27, 1908, quoted at pages 2, 3, 4 of petitioner's brief, will show that the entire jurisdiction and power of the Secretary is limited to two things: *He may remove restrictions, and he may approve or disapprove leases.* The gift here in question certainly was not a lease. Therefore, the Secretary's approval of the gift—followed, of course, by his surrender of his custody of the bonds—could not have been anything other than a removal of the restriction. He thereby consented to an alienation, which is what a removal of the restriction amounts to.

This much we do not understand petitioner to controvert, and, in any event, it would of course be absurd to say that the fund was still restricted after the Secretary himself voluntarily had relinquished his custody and turned the bonds over to the Trust Company under a trust under which they would eventually go to the Mission Society.

The gist and point of petitioner's argument is that the District Court, in deciding the merits of the case, ruled that the Secretary's act was *void*, and, therefore, the restriction never was removed, despite the Secretary's attempt to remove it, and the fund thus always remained and

now is restricted against any alienation without a new approval or consent by the Secretary. That thought is asserted in various forms throughout petitioner's brief—the idea that the Secretary's act was found by the court to be *void* being asserted at pages 20, 21, 22, 23, 25, 26 and 27.

The underlying basis of the argument is thus untenable, for, as pointed out at pages 12-18, *supra*, the court, in deciding the merits of the case, *did not rule that the Secretary's act was void but, on the contrary, assumed it to be valid.* We already have analyzed its opinion and need not repeat what has been said, but a reference to the cases which the District Court cited—*Jennings* v. *Wood*, 192 Fed. 507, and *Kendall* v. *Ewert*, 259 U. S. 139—will emphasize the point.

In *Jennings* v. *Wood*, a lease by a minor allottee of the Cherokee tribe which had been approved by the Secretary was cancelled on the ground that a minor is incapable of contracting, the point decided being that the Secretary's approval could not give validity to a lease that was void because of contractual incapacity of the parties to it. In *Kendall* v. *Ewert*, a conveyance by a mentally incompetent Indian was adjudged void because of his mental incapacity although the conveyance had been approved by the Secretary. In neither of those cases was there any question about the power or authority of the Secretary and no suggestion that his act was irregular or void or voidable. The decisions simply proceeded upon the ground that the Secretary's approval, although regular and valid in itself, was nevertheless ineffective to make valid a conveyance which was void because of the contractual incapacity of the par-

ties to it; and that is the same ground upon which the District Court proceeded in the case at bar.

In other words, the gift in the case at bar (like the conveyances in *Jennings* v. *Wood* and *Kendall* v. *Ewert*) were set aside, *not because the Secretary did not remove the restrictions, but despite the fact that he had removed them.*

Petitioner also stresses the fact that the court returned the fund to the Secretary. It asserts that *the fact of such return* "stands as a conclusive decision that the restrictions had not been removed by the Secretary" (p. 22) or "plainly implied that it (the court) was of the opinion that the fund was a restricted fund" (p. 25). We think that argument a complete *non sequitur*. The court could not turn the fund over to the physical custody of Barnett. No guardian was before the court asking for its custody. The fund had to go somewhere; and it was not an absurdly strange or unnatural thing for the court to send it to the official charged by Congress with the custody of Indian funds—even though he had not proved a very efficient or faithful custodian of this particular fund in the past. The court may have thought that with the admonitions of its decision that official would do better in the future. At all events, petitioner certainly cannot ask this court to construe the return of the fund to the Secretary as indicating a ruling that restrictions had not been removed when the same judge who directed that return specifically asserts, with the point brought to his attention, that the Secretary "saw fit to release the supervision over the disposition of the fund which had been committed to him by Congress" (R. 162). However often this court may differ from the District Judges on questions of law and fact, it hardly will

differ from what one of them says his own ruling means. It will not construe a ruling differently from the way the judge says he meant it. That is what petitioner is asking the court to do when it asserts that the fact of the return of the fund to the Secretary means that the District Court ruled that restrictions had not been removed.

We do not know of any justification for petitioner's position that the Secretary "could not hold any funds except restricted funds" (p. 22) and cannot "again receive possession of a fund after he has validly released restrictions" (p. 23). But if that view be right, we suppose the Secretary will decline to receive the fund and the court will have to find another custodian.

Whether or not, if and when the Secretary receives the fund back in its possession, the fund will then again become restricted—in other words, whether or not the court's direction for the return amounts to a reimposing of the restrictions—is a question which it is not necessary at this time to determine.

POINT V.

The fund was subject to allowances by the court even though the restriction on alienation had not been removed.

Let us now assume that the restriction on alienation never had been removed. Even upon that assumption, the allowances are proper.

A.

Inalienability or Immunity of Property Does Not Defeat the Right or Power of a Court Having Jurisdiction Over It to Subject It to Claims for Recovering or Preserving It.

The case of *Kendall* v. *Ewert*, 259 U. S. 139, 149, was cited by both courts below (R. 162, 178), and is, we submit, an authority supporting their decision. In that case the suit was brought by an Indian against one to whom he had conveyed his *restricted* land, and the relief prayed for was a decree that the grantee held the land in trust for the Indian. The Indian died and the suit was revived in the name of his administrator and heirs. The heirs then settled with the grantee, and it was contended that an appeal by the administrator should be dismissed for the reason that he was not competent to prosecute it. The argument, as stated by this court, was that "the land involved continued *under restriction* until September 26, 1921, that neither it nor the royalties issuing therefrom could be incumbered until that date, and that both passed to the heirs so *freed from charges of any kind* that there was no property or estate for an administrator to administer and no function for him to perform." In rejecting that argument this court said (p. 149):

> "With this we cannot agree.
>
> "The petition in the case prayed for recovery of the land and also for an accounting for rents and profits. That Redeagle or his heirs could institute such a suit is not disputed *and to maintain it he must employ counsel and create court costs which should be paid.*

> The record shows that large sums in royalties for zinc and lead ores mined from the lands involved had been paid to Ewert, and these when accrued were clearly personal property (United States *v.* Noble, 237 U. S. 74, 80), which, on the death of Redeagle, would pass to his administrator for purposes of paying any inheritance or other taxes which might be properly chargeable against it, *and for other administration charges* and for distribution."

In *Winton* v. *Amos*, 255 U. S. 373, 393, the court stated that the principle upon which courts of equity award compensation out of a fund to counsel who have recovered or benefited the fund is *analogous to the salvage services of the maritime law.* The numerous cases in which claims for salvage services have been sustained and enforced against *property owned by a sovereign* thus, also, sustain the right of the courts below to make the allowances in this case, even though the fund in question were in truth restricted; for the restriction against alienation without the Secretary's approval certainly is no stronger and no more sacrosanct than a sovereign's immunity.

Among the cases of that kind, special attention is called to *The Davis*, 10 Wall. 15, in which property of the United States was subjected to a claim for salvage services despite the sovereign's immunity from suit and despite the fact that the claim could not have been enforced by suit *in rem* against the property if it had been necessary, in order to enforce the claim, to take the property out of the possession of the government by any writ or process of the court. This court stated that when property of the government

has been saved from destruction by salvors, "justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition" (p. 19); and the court held that as the property was not in the possession of the government (having been seized by the marshal under the libel while in the possession of the vessel which had contracted to carry it for the United States) the court could and should "enforce the lien of the libellants for the salvage *before it restored the cotton to the custody of the officers of the government*" (p. 22). The court also pointed out that by possession it meant *actual* possession, and not merely constructive possession implied from ownership, and that as the court could enforce the claim for services without "bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist" (p. 22), the court had jurisdiction to enforce the claim.

Other cases to the same effect are:

United States v. *The Thekla*, 266 U. S. 328;
The Siren, 7 Wall. 152;
In re United States Steel Products Co., 24 Fed. 2d, 657 (C. C. A., 2d Circuit).

Those cases, we submit, authoritatively establish that, even if it be assumed that the fund here in question was restricted and could not have been subjected to claims for attorneys' services if the fund were in the actual possession of the Secretary, yet, inasmuch as it was *not* in the actual possession of the Secretary, the claim for services may be enforced by the courts, and that it was the duty of the

courts to enforce it before restoring the fund to the Secretary.

As stated by both courts below, the fund passed out of the possession of the Secretary and court action was necessary to get it back (R. 162, 178). Petitioner, by its intervention in respondents' suit, joined with respondents in endeavoring to get it back; and as was said by this court in *United States* v. *The Thekla, supra*, at pp. 339, 340:

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libelled by the United States were the vessel in other hands, the moral right of the claimant is recognized."

The restriction against alienation without the Secretary's approval was imposed by Congress in order to protect the Indians from despoilers, and not to enable them to avoid just claims for services in recovering their property where the Secretary himself has failed to protect them.

As the property of the United States itself may be subjected to claims for services in salvaging it, there is no reason why the property of Indians may not be subjected to similar claims even though the Indian himself may have no right to convey or encumber it.

Attention is also called to *New York Dock Co.* v. *S. S. Poznan*, 274 U. S. 117, in which a claim for wharfage of a

vessel *in custodia legis* was allowed as a preferred claim upon the proceeds of the vessel. The court there stated that such a claim should be allowed as an "expense of justice" without regard to any equitable or maritime lien in a technical sense. The principle of that case, as well as much of the language in the opinion (pp. 121, 122), is applicable here.

B.

THE FUND IS SUBJECT TO ALLOWANCES BECAUSE IT IS A TRUST FUND AND A COURT OF EQUITY HAS POWER TO CONTROL THE CONDUCT OF A TRUSTEE OF SUCH A FUND.

The same result which the courts have reached in the preceding cases will also be reached if the matter be approached from a different angle.

Barnett is the owner of the bonds and the Secretary, as an official of the United States, is merely a trustee. And under existing law the restriction will expire and the trusteeship will end in April 1931.

The trusteeship of the Secretary does not have all the elements of a private trust, in that the Secretary is a self-appointed trustee, and the trust is terminable at his will (*U. S. Fidelity & Guaranty Co.* vs. *Hansen*, 36 Okla. 459; 129 Pac. 60); and while it has been held that the Indian, or his representative, cannot arbitrarily compel the Secretary to surrender *all* the funds belonging to him (*Parker* vs. *Richard*, 250 U. S. 235), it never has been held that the courts are powerless to compel the Secretary to apply a reasonable portion of the Indian's funds for his benefit, and we do not apprehend that any court ever will so hold.

Suppose, for example, that Barnett had ample funds in the hands of the Secretary but nothing with which to buy food, and that the Secretary refused to release any part of his funds to him for the purpose of his support. Could it be said that the courts are powerless to so control the discretion of the Secretary as to compel him to surrender to Barnett, or to his representative, a reasonable amount of his funds? The question answers itself. The courts do have power to prevent such an arbitrary abuse of discretion. The Secretary, in the administration of these trust funds, is subject to the control of a court of equity in the same manner and to the same extent as a trustee of a private trust. In each instance, the court will not ordinarily interfere with the discretion of the trustee, but will do so if he act arbitrarily or capriciously or abuse his discretion.

While we have referred to the Secretary as the trustee, the real trustee is the United States. (*U. S. F. & G. Co.* vs. *Hansen, supra*). The court thus had jurisdiction of the parties, including the trustee by its own intervention, and of the funds out of which the allowance was requested. What, then, were the powers of the court below, sitting as a court of equity, to break in upon this trust and direct the payment of the expenses of this litigation?

There are numerous cases on the subject, of which *Bennett* vs. *Nashville Trust Company* (Tenn.), 153 S. W. 840; 46 L. R. A. (N. S.) 43, is a type. In that case, a will had directed the executor to hold $1,000., with all accumulations, until a certain infant had attained the age of twenty-five years, when said sum, with all accumulations, was to

be paid to her. While still a minor, the beneficiary filed a bill, by a next friend, setting forth that she needed the money to complete her education, and it was held that a court of equity had power in the interest of the infant to break in upon the terms of the trust and permit the beneficiary to use the income in advance of her becoming twenty-five years of age. In a note to the case as reported in 46 L. R. A. (N. S.) 43, many other cases to the same effect are collected. The author of the note says (p. 44):

"The cases all agree that where peculiar circumstances have arisen not expressly provided for by the trust instrument, and not anticipated by its author, the court in the emergency that has arisen has jurisdiction to sanction acts by the trustees which in ordinary circumstances they would have no power to do."

Also, at pages 45, 46:

"It has also been held in numerous instances that equity may make an allowance out of the income of a trust estate for the support of an infant *cestui que trust* although the instrument creating the trust contains no provision for maintenance and there is a direction that the income shall accumulate.

Also at page 51:

"Where there is an absolutely vested gift made payable at a future event, as upon the legatee's attaining a certain age, or upon the decease of an annuitant, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee."

Quoting from *Stephens* v. *Howard*, 32 N. J. Eq. 244, it said (p. 45):

> "The source of the power is easy to trace. It is found in the fact that the infant is the absolute owner of the property, no other person having either a present or prospective legal interest in it; and that, if the present enjoyment of the property is withheld, the infant must suffer, possibly for the advantage of some person who has no interest in the infant and was never thought of by the testator as a possible recipient of his bounty."

At page 49 it is said:

> "While the power of courts of equity to hasten enjoyment of a trust fund is most frequently exercised for the benefit of infants, it has also been exercised in other cases where the exigencies of the situation have seemed to demand it."

The rule applies where the beneficiary, although of full age, is feeble minded (*Longwith* v. *Riggs*, 123 Ill. 258, 14 N. E. 840).

It is true that in some of the cases the reason for the court's breaking in upon the terms of the trust is said to be that the creator of the trust would have authorized such action had he anticipated such emergency, whereas here the Secretary was appraised of the emergency and yet refused to authorize the requested use of the funds. That, however, is immaterial. The important thing is that the cases cited show that it is *within the power of a court of equity* to break in upon the terms of the trust whenever a *proper case* is presented; and the case at bar really is a

stronger case in favor of the existence and exercise of this power of the court than the cases which we have cited, *because the beneficiary here has been obliged to prosecute this suit to undo a wrongful and illegal act on the part of the trustee.*

The feature is vividly brought out in the opinion of Judge KNOX at R. 160, 161.

It would be absurd to say that courts of equity have power to permit trust property to be used in contravention of the terms of a trust in order to enable the beneficiary to go to school and yet have not the power to permit the funds to be used in contravention (as we now assume for purpose of argument) of the terms of the trust in order to defray the *expenses of a suit to recover property wrongfully dissipated by the trustee;* and it would be a travesty to say that the power is lacking *merely because the trustee does not wish the funds to be so used.*

Moreover, there is no requirement of any law that the Secretary of the Interior hold these funds for any particular length of time, and hence it is not necessary in this case to go to the extent held proper by the foregoing authorities, namely, to break in upon the terms of the trust. It is only necessary here to control the discretion of the trustee to prevent an abuse thereof. This the court below had undoubted power to do (*Keeler* v. *Lauer* (Kans.), 85 Pac. 541). In that case a testamentary trust authorized the trustee to sell property and re-invest the proceeds and to apply such part of the estate as he deemed appropriate to the maintenance and education of the children of the testatrix, and the court said (syllabus):

"Notwithstanding the powers and discretion given to the trustee, he is subject to the direction and control of a court of equity, which will have full power to prevent mismanagement of the estate and to correct any abuses of the trust."

See, also, note on this subject in 8 L. R. A. (N. S.) 398.

The fact that the trustee in this instance is an officer of the United States Government does not exempt him from the control of the courts in a proper case, namely, to prevent acts which are arbitrary, capricious, or an abuse of discretion.

Work v. *Rives*, 267 U. S., 175, 183, 184.

C.

COURTS OF EQUITY HAVE A SPECIAL DUTY TO PROTECT THE RIGHTS OF INCOMPETENTS, AND FROM THAT DUTY THERE FLOWS THE CORRELATIVE POWER.

It being established that these funds are subject to the control of a court of equity, despite the existence of the restrictions, it only remains to point out that a court of equity always is under a special duty to protect the rights of an incompetent in any case which comes before it to which the incompetent is a party. That is so well settled that we shall here do no more than call attention to *Edwards* vs. *Edwards*, 14 Tex. Civ. App. 87, in which allowances were made to the next friend and his attorneys out of the fund there in litigation. In that case the court made the following significant remark (p. 92):

"So as to the allowances, if litigation of this class

must be undertaken by a next friend at his own expense, a court of equity being denied the power of doing full justice to all parties by its decree, such next friend would likely be deterred from often undertaking so kindly and costly a service for an unfortunate victim of infirmity and fraud."

It is the *duty* of a court of equity to make all orders necessary to protect the rights of an incompetent; and in *Heckman* vs. *United States*, 224 U. S. 413, 437, the court, in discussing the power of the United States to sue on behalf of an Indian ward, said: ". . . . there arises the *duty* of protection and *with it the power.*"

The same thing may be said here—from the duty there flows the *power* to perform it.

POINT VI.

Respondents have a lien upon the fund, and are entitled to an allowance out of the fund for that reason.

The settled doctrine that expense incurred and services performed in recovering a fund may be reimbursed and compensated by allowances made by the court out of the fund recovered, is applicable here and affords a sufficient basis for the allowance.

Trustees v. *Greenough*, 105 U. S. 527;
Central Railroad and Banking Co. v. *Pettus*, 113 U. S. 116;
Winton v. *Amos*, 255 U. S. 373, 391, 392, 393;
United States v. *Boyd*, 79 Fed. 858;
Colley v. *Wolcott*, 187 Fed. 565.

The most usual application of the doctrine is in cases where one sues for the benefit of a class, but it is equally applicable where one plaintiff alone sues on his own behalf.

Harrison v. *Perea*, 168 U. S. 311, 325.

The attorney's right to be compensated for his services is in the nature of, and is treated as, a lien upon the fund recovered.

In re Paschal, 10 Wall. 483, 493;
In re Baxter & Co., 154 Fed. 22, 24 (C. C. A., 2nd Circuit);
Ingersoll v. *Coram*, 211 U. S. 335, 368.

In addition to that equitable doctrine, the right here is fortified by the New York statute, which provides (*Judiciary Law*, § 475, formerly Code Civ. Proc., § 66):

"§ 475. *Attorneys' lien in action or special proceeding.* From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien."

That statute is not a mere practice act. It establishes a substantive right and is controlling on the Federal courts sitting in New York and may be enforced in such courts.

In re Baxter & Co., 154 Fed. 22 (C. C. A., 2nd Circuit);

Meighan v. *American Grass Twine Co.*, 154 Fed. 346 (C. C. A., 2nd Circuit).

In Oklahoma, also, attorneys are given a similar lien by Section 4100 of Oklahoma Compiled Statutes, 1921.

The court having control of the fund is to provide for that lien before surrendering its control.

Tuttle v. *Claflin*, 88 Fed. 122, 124, 125 (C. C. A. 2nd Circuit).

THE CONTENTION THAT THE ALLOWANCES ARE ERRONEOUS BECAUSE RESPONDENTS DID NOT PERFORM CERTAIN FEE CONTRACTS TO WHICH PETITIONER REFERS IS NOT OPEN FOR REVIEW HERE, AND, IN ANY EVENT, IS WHOLLY UNTENABLE.

Apart from the question as to restrictions on alienation, the power of the Court to make the requested allowances was not challenged either in the District Court (R. 141, 142) or in the Circuit Court of Appeals (R. 169, 170), or in the petition to this court for the writ of certiorari.

Under those circumstances, the new point which petitioner now makes at pp. 31-36 of its brief, is not open for consideration.

Alice State Bank v. *Houston Pasture Co.*, 247 U. S. 240;

Webster Co. v. *Splitdorf Co.*, 264 U. S. 463, 464;

Steele v. *Drummond*, 275 U. S. 199, 203;

Commercial Credit Co. v. *United States*, 276 U. S. 226, 229, 230.

But if considered it will be found to be wholly untenable.

As already pointed out, respondents never prosecuted this case under those contracts (*supra*, p. 11), and certainly neither of the courts below based their decisions upon them. It is true, of course, that respondents got into the case because Bailey, the then guardian, had retained Hummer & Foster as his attorneys and Hummer & Foster got the other respondents to assist them (R. 113-115; 137; 102). Respondents were not intermeddlers and their services were not intended to be gratuitous (*Winton v. Amos*, 255 U. S. 373, 394), but the suit was not brought by the guardian or in a jurisdiction where, as such, he had a right to sue.

The idea which petitioner seems to be trying to get into the mind of the court by presenting this point is that respondents did not win the case. To do that it is asserted in various places and by various forms of expression that the object of the bill filed by respondents was to get the bonds for Bailey, as guardian, and that that object failed (Brief, pp. 32, 33, 38). The plain answer is that the bill prayed for a return of the bonds to Barnett, the plaintiff (R. 13).

The object of the suit was to get the bonds back *for Barnett as his property*, and that is what was accomplished. Actual physical custody or possession was of comparatively little moment.

Moreover, the case was actually won upon respondents' theory and not upon the theory upon which petitioner elected to go to trial. By withdrawing, at the opening of the trial, its allegation that the Secretary's amendatory

regulation of October 7, 1922, was invalid (R. 83), petitioner conceded the Secretary's power to pay out an Indian's money in any way he thought was "for the benefit" of the Indian and thus left the case in peril of its being decided that a court cannot review a Secretary's determination as to what is for an Indian's "benefit."

But even if respondents had prosecuted this case under a contract, and even if they had failed to perform that contract literally and according to its terms, or even if the contract were invalid, they nevertheless would be entitled to compensation out of the fund because they actually benefitted and were instrumental in recovering the fund for the owner of it.

In *Winton* v. *Amos*, 255 U. S. 373, 393, the court, in sustaining the right of attorneys to compensation out of Indian funds, said:

> "The fact that in the present case the services were rendered under contracts with particular Indians, whether valid or invalid, is no obstacle to a recovery. Services not gratuitous, and neither *malo in se* nor *mala prohibita*, rendered under a contract that is invalid or unenforceable, may furnish a basis for an implied or constructive contract to pay their reasonable value."

And although there were specific contracts in that case this court applied the equitable doctrine of charging the fund with the cost of the services which benefitted it.

To the same effect is *McGowan* v. *Parish*, 237 U. S. 285,

299, 300, which related specifically to attorneys' fees and where the contract was not literally performed; and the same principle was applied in *New York Central R. R. Co.* v. *Gray*, 239 U. S. 583.

In fact, it is a well-settled doctrine that where a contract, not *malum in se* or actually void because contrary to public policy, is or becomes unenforceable because prohibited by or not in exact conformity with some statute or because not fully performed, there nevertheless may be a recovery for services rendered or property delivered under the contract.

> *Hill County* v. *Shaw & Borden Co.*, 225 Fed. 475 (C. C. A. 9th Circuit);
> *Stephens* v. *Phoenix Bridge Co.*, 139 Fed. 248 (C. C. A. 2nd Circuit);
> *City of St. Charles* v. *Stookey*, 154 Fed. 772, 776, 777 (C. C. A. 8th Circuit). Certiorari denied, 208 U. S. 617.

In such cases the contract is evidence establishing the reasonable value of the services rendered.

> *City of St. Charles* v. *Stookey*, *supra*, at p. 777;
> *Ludlow* v. *Dole*, 62 N. Y. 617;
> *Rubin* v. *Cohen*, 129 N. Y. App. Div. 395, 397;
> *Hollander* v. *Kaufman*, 172 *id.* 218;
> *Boyd* v. *Vale*, 84 *id.* 414, 416;
> *Jeffery* v. *Walker*, 72 Hun 628, 631.

Upon the authority of those cases we urged upon the District Court that it *very well might* follow the contract which Hummer & Foster had made with the guardian *as a*

measure of the allowance, although we conceded that the contract had no binding effect. The District Court refused to do that, however, and fixed the allowance *at the amount which in its judgment seemed fair and reasonable* (R. 162).

POINT VII.

The amount of the allowances should not be disturbed.

As petitioner has not brought the entire record to this court—the evidence taken, the briefs prepared, and the proceedings upon the trial, being omitted—we submit that this court necessarily is so precluded from knowing either the extent or value of the services rendered by respondents that petitioner is in no position to ask that the amount of the allowances be reviewed.

Under these circumstances, this court will presume that the decree, in so far as it stands upon the question of amount, is supported by the evidence.

Zimmerman v. *Harding*, 227 U. S. 489, at p. 496;
Carson v. *Hurt*, 250 Fed. 30, 33 (5th C. C. A.);
Pappas v. *Baltimore & Ohio R. Co.*, 37 Fed. 2d, 271, 272 (6th C. C. A.).

Furthermore, both courts below certainly are in agreement that the amounts finally allowed are *not excessive;* and in *United States* v. *Carter*, 217 U. S. 286, 319, 320, this court said with respect to an allowance out of a fund:

> "So far as the amount of the allowance is concerned we do not feel authorized to disturb it, as two

courts in succession have concurred in the amount allowed as reasonable."

It may be mentioned in passing that in that case counsel was allowed a fee of $60,000 in a case in which he was unsuccessful and in which there was no element of contingency.

If, despite the foregoing, the court feel inclined to go into the question of amount, we call attention to the following considerations.

Petitioner's naïve description of the case and of the services, at pages 38 and 39 of its brief, is so lacking in correlation with the facts that we pass it without comment, except to say that if respondents "neglected" to call Barnett as a witness, then petitioner itself was guilty of the same neglect. Before the conflict had terminated in victory, petitioner had concurred with respondents that it was good strategy to procure Barnett's presence upon the trial and put those who asserted his competency in the position of refusing to call him (R. 107, 108, 157, 91).

As to the nature and extent of the services actually rendered, the best we can do, in the absence of the entire record, is to refer the court to respondents' affidavits at R. 101-141, 154-160, and to the opinions of the District Court at R. 84-96 and 160-163.

Four firms have been engaged upon the litigation for substantially five years. From June, 1924, to February, 1927, Mr. Foster was engaged upon the matter for three-fourths of his working time, which means about 600 days (R. 113). From January, 1925, to January, 1927, Mr. Walter devoted to the case approximately one-third of his work-

ing time, which means about 200 days (R. 102). In addition, there were other services by other members of Mr. Walter's firm and by lawyers in its employ (R. 102); and also the services of Mr. Cochran (R. 137-141) and the help rendered by Mr. McCrory. There were, also, the following services subsequent to final submission of the case to the District Court in January, 1927, *viz.*: Preparation and entry of the final decree, the dismissal of the Mission Society's appeal, and the successful opposition to its petition for a writ of certiorari.

If those services had been performed for a competent and solvent client, without any element of contingency, $125 per day certainly would be reasonable; and on that basis the services of Mr. Foster and Mr. Walter alone, down to January, 1927, would call for an allowance of $100,000. Doubling that amount because of the hazard and contingency, those services alone would call for an allowance of $200,000.

In *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101, this court allowed $49,250 for 282 days' work (which is at the rate of $175 per day) for the services of a Special Master in a matter which involved no element of risk or contingency. At that rate, the services of Mr. Foster and Mr. Walter alone, down to January, 1927, would call for an allowance of $140,000, and doubling that amount because of the hazard and contingency would make $280,000.

Looking at the matter from a percentage standpoint, the allowance of $100,000 is but slightly over fifteen per cent., even upon the Circuit Court of Appeals basis of computing the amount involved (R. 179, 180); and we respectfully submit that never yet have counsel been cut down to

such a low percentage in any contested case taken upon a contingent basis. Persons *sui juris* constantly contract for a much larger percentage, and we submit that there is no reason why the courts should ignore that usual business practice and require that incompetents be served for less than competent clients usually agree to pay. Even in simple negligence cases, requiring but little time and presenting no unusual difficulty, contracts for much larger percentages of the recovery are customary, and much larger percentages constantly are being awarded by the courts in cases where infants are involved.

In *Hodgman* v. *Atlantic Refining Co.*, 8 Fed., 2d, 777, the District Court in Delaware allowed one-third of the recovery up to $500,000 and ten per cent. of the excess up to $1,000,000 and five per cent. of the excess above $1,000,000.

In *Grant* v. *Fletcher*, 283 Fed. 243, 274, the District Court in Michigan awarded fifty per cent. of the recovery.

In *Frink* v. *McComb*, 60 Fed. 486, decided as long ago as 1894, an allowance of one-third of the recovery, with interest, in addition to expenses, was made by Judges WALES and DALLAS.

We submit that the Circuit Court of Appeals in this case has erred on the side of caution and illiberality rather than on the side of excess.

We submit, also, that the Circuit Court of Appeals erred, as matter of law, in ruling that the services rendered in the litigation in Oklahoma cannot be paid for out of the fund here involved (R. 178, 179). While respondents of course cannot urge that error for the purpose of increasing the allowance, because they have not applied for a cer-

tiorari, they may urge it as an additional reason justifying the allowance.

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party * * *. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined."
>
> *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435, 436.

The reasoning of the Circuit Court of Appeals with respect to respondents' services in the litigation in Oklahoma was that neither a revocation of Bailey's letters of guardianship nor the granting of a writ of prohibition by the Supreme Court of Oklahoma would have prevented the prosecution of this suit, because if Bailey had been ousted or prohibited the District Court could and would have substituted another *prochein ami* or the United States might have proceeded with this suit alone, and therefore respondents' resistance to the writ of prohibition and the attack upon the guardianship did not aid in winning this case (R. 178, 179). It was easy for a court of last resort to assert that after the litigation was over; but though that was

respondents' own view at the time (R. 120) we submit that no one could be sure that that view would be taken until after the court had spoken, and that it would have been gross carelessness for respondents to have allowed the Oklahoma litigation to go by default.

Moreover, the Circuit Court of Appeals overlooked the real purpose which respondents' opponents sought to obtain in the Oklahoma litigation. The attack upon the validity of the guardianship involved a great deal more than merely a continuance of Bailey's status as guardian, and resistance to the attack was not inspired by a mere desire to preserve the validity of the contract of Hummer & Foster with the guardian as the Circuit Court of Appeals seems to suggest. The appointment of the guardian involved *an adjudication of Barnett's mental incompetency*, and one of the points relied upon by respondents was that that adjudication was *conclusive* and in itself established the invalidity of the gift as matter of law. *The purpose of the attack upon the validity of the guardianship was to get rid of that conclusive adjudication—not merely to get rid of Bailey;* and the purpose of respondents' opposition to the attack was to preserve the adjudication because of the help the adjudication gave in winning this suit. The validity of the guardianship also had an important bearing upon the capacity of the United States to prosecute in Barnett's behalf (so important that petitioner joined with respondents in resisting the attack upon it), because the right of the United States to maintain a suit in behalf of an Indian whose property has been gotten away from him had been said by this court to be limited to cases where the conveyance was in violation of restrictions imposed by

Congress (*Bowling* v. *United States*, 233 U. S. 528, 534; *United States* v. *Waller*, 243 U. S. 452, 462, 463), and as the Secretary of the Interior had approved the gift there was a serious question whether there was any violation of a Federal restriction if there were no guardianship. The theory of the United States' petition of intervention in this case was that *the guardianship itself was a Federal restriction* (R. 50, 64-66, 72, 74, 80),* and in resisting the attack upon the validity of the guardianship respondents were endeavoring to prevent a situation which might lead to the conclusion that the United States had no authority to prosecute this suit.

The petition to the Oklahoma Supreme Court for a writ of prohibition likewise involved a great deal more than the mere ability of Bailey to proceed with this suit. That petition proceeded upon the theory that the power and jurisdiction of the Secretary of the Interior over Barnett's funds were *exclusive* and that his acts with reference thereto could not be questioned by any court (R. 120, 121; 133); and while the *surface* question in that case was whether or not *Bailey* could prosecute this suit, *the underlying and controlling legal question was whether or not* ANYBODY *could prosecute it*. What respondents were faced with, therefore, was the possibility of an adjudication that would tear this case up by the roots. True, the District Court in New York *might* have refused to follow a deci-

*Numerous cases recognize and assert that the Oklahoma County Courts in exercising their jurisdiction over Indians are Federal agencies. *Parker* v. *Richard*, 250 U. S. 235, 238, 239; *United States* v. *Gypsy Oil Co.*, 10 Fed. 2d 487, 491, 492; *Chisholm* v. *Creek & Indiana Dev. Co.*, 273 Fed. 589, 594, affirmed 282 Fed. 93, reversed in part 264 U. S. 488; *Priddy* v. *Thompson*, 204 Fed. 955; *Truskett* v. *Closser*, 236 U. S. 233; *Barbre* v. *Hood*, 238 Fed. 658, affirming 214 Fed. 473; *Kichen* v. *Cheney*, 235 Fed. 104.

sion of the Supreme Court of Oklahoma, but, on the other hand, it conceivably might defer to it, or even hold it to be absolutely binding as *res adjudicata*, inasmuch as Barnett and the United States and Bailey were all parties to the prohibition suit. Would not respondents, therefore, have been grossly negligent if they had failed to resist the prohibition suit?

This litigation in Oklahoma was exceedingly complicated and difficult, and the services rendered by respondents in it were exceedingly extensive and prolonged and of a high order (R. 119-124, 131-136), and they were successful in defeating the petition for the writ of prohibition (R. 124).

It is of course obvious that the allowances will not cause Barnett any hardship. When the gifts were made they represented practically all his accumulated royalties, but it appears from the testimony of Commissioner Burke upon the trial herein that in October, 1926 (three and one-half years after the making of the gifts) the Secretary of the Interior had in his custody belonging to Barnett nearly $400,000, and that Barnett's allotment was still yielding him royalties at the rate of $2,000 per month (S. M. of Trial, p. 354). In a statement before the Senate Committee on Indian Affairs on January 13, 1928 Commissioner Burke stated that Barnett then had an income from all sources of $68,000 a year.

The property which is now to go back to Barnett as a result of this suit is well over $600,000, *after all allowances*

are paid (the $511,795.83 set forth at R. 168 plus $84,881.08 taken from the District Court's allowances by the Circuit Court of Appeals and plus interest since the decree was made), and he thus has over $1,000,000 besides his 160 acres of oil-producing land.

It is also significant that the amount which goes back to Barnett as the result of the suit, *after all allowances are paid*, is more than $50,000 in excess of the value of the fund at the time it was given away. In other words, the allowances do not equal, and are thus entirely paid out of, the interest which has accrued upon the bonds during the pendency of the litigation. The original principal given away remains intact and has in fact increased.

Conclusion.

The decree should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,
Counsel for all Respondents to whom allowances were made

April, 1930.